

No. 89-1263

Supreme Court, U.S.

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JOSEPH F. SPANIOLO, J.  
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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1989

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WILLIAM R. FISCHER, The Estate of  
BETTY L. FISCHER, MONTFORD R. FISCHER  
and BONITA G. FISCHER,

*Petitioners,*

v.

NWA, INC., NORTHWEST AIRLINES, INC., and  
SIMMONS AIRLINES, INC.,

*Respondents.*

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Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

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**BRIEF IN OPPOSITION  
FOR RESPONDENT SIMMONS AIRLINES, INC.**

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v.

NWA, INC., NORTHWEST AIRLINES, INC., and  
SIMMONS AIRLINES, INC.,

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Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Eighth Circuit

BRIEF IN OPPOSITION  
FOR RESPONDENT SIMMONS AIRLINES, INC.<sup>1</sup>

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Respondent Simmons Airlines, Inc. ("Simmons"),<sup>2</sup> respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Eighth Circuit Court of Appeals.

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<sup>1</sup> The following abbreviations are used in this brief: "Pet." (Petition for Certiorari); "App." (Appendix to Petition for Certiorari); "J.A." (Joint Appendix Submitted to the Eighth Circuit Court of Appeals); "Tr." (Transcript of Hearing on Respondents' Motions for Summary Judgment).

<sup>2</sup> The Eighth Circuit opinion in this case is dated August 17, 1989. Pursuant to Supreme Court Rule 29.1, the only relevant party in the district court was Simmons Airlines, Inc. ("Simmons"). Simmons was acquired by AMR Eagle Inc. on August 8, 1988, and AMR Eagle Inc. is a wholly owned subsidiary of AMR Corporation.

## STATEMENT OF THE CASE<sup>3</sup>

This action arises from the unilateral termination of

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<sup>3</sup> Simmons presents this Statement of the Case pursuant to the admonition contained in Supreme Court Rule 15.1 that "the brief in opposition should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would properly be before the Court if certiorari were granted." Fischer Bros.' Statement of the Case contains numerous half-truths and misstatements of fact. For example, Fischer Bros. asserts:

Hall also originally testified that when he drafted the termination notice, he knew that Simmons had been negotiating with Fischer Bros., that the negotiations had broken down, and that Simmons had withdrawn its offers of purchase. On reading and signing his deposition, Hall then changed his testimony to state that he was aware only that negotiations between the parties had "broken down."

(Pet. at 9; *see also* App. at A-20 (Larson, J., concurring in part, dissenting in part)). Contrary to Fischer Bros.' assertion, Hall clarified his testimony during his deposition. (J.A. at 677-78, 701, 719, 722).

Likewise, Petitioners assert that "Fischer Bros. did not contact Northwest from the time Rasmusson left the meeting in Chicago on September 23 until Fischer Bros. received the termination notice on September 24." (Pet. at 9; *see also* App. at A-20 (Larson, J., concurring in part, dissenting in part)). Fischer Bros. intends that this Court conclude that Simmons contacted Rasmusson and informed him that negotiations had ended. Rasmusson, however, testified in great detail regarding a telephone call he received from William Fischer on the evening of September 23. (J.A. at 94, 132-33, 199-200). William Fischer first testified that he did not know if he called Rasmusson that evening and then, changing his testimony, stated that no such conversation occurred. (J.A. at 4469-72).

Fischer Bros. Aviation, Inc. ("Fischer Bros.")<sup>4</sup> by Northwest Airlines, Inc. ("Northwest"),<sup>5</sup> pursuant to an agreement between Fischer Bros. and Northwest which provided that "[e]ither party could terminate the agreement unilaterally, with or without cause, after providing six months notice." (App. at A-4). Fischer Bros.' First Amended Complaint (the "Complaint") contained nine counts, only four of which were asserted against Simmons. Fischer Bros. alleged that Simmons:

- (1) Conspired with Northwest to restrain trade in violation of Section 1 of the Sherman Act;
- (2) Monopolized, attempted to monopolize and conspired with Northwest to monopolize in violation of Section 2 of the Sherman Act;
- (3) Tortiously interfered with the contract between Fischer Bros. and Northwest; and
- (4) Conspired with Northwest to interfere with Fischer Bros.' prospective advantage.

(J.A. at 1-48). The allegations against Simmons consisted entirely of conclusory allegations that Simmons acted "in

A third example is Fischer Bros.' claim that "[d]uring his tenure at Republic, Rasmusson had worked closely with Joel Murray, Simmons' chairman . . . ." (Pet. at 7; *see also* App. at A-18 (Larson, J., concurring in part and dissenting in part)). On the contrary, Joel Murray testified that he had "very few dealings with Mr. Rasmusson," since they operated at different levels. (J.A. at 1253, 1318, 1433).

<sup>4</sup> Petitioners are the former shareholders of Fischer Bros. Petitioners sold Fischer Bros. to Midway Airlines for \$2.235 million, while assigning Fischer Bros.' claims in this lawsuit to themselves for \$15,000. *Fischer Bros. Aviation, Inc. v. NWA, Inc.*, 117 F.R.D. 144 (D.Minn. 1987).

<sup>5</sup> Respondents NWA, Inc. and Northwest Airlines, Inc. are referred to collectively as "Northwest."

conjunction and collaboration" with Northwest. (*Id.* at 1-46, ¶¶ 41, 42-45, 49, 52).

In opposition to Fischer Bros.' motion for a temporary restraining order and limited preliminary injunction (which was denied by Chief Judge Alsop), Simmons filed an affidavit by its Chairman of the Board, Joel Murray. (J.A. at 5865-6058). At his deposition, Mr. Murray reaffirmed this affidavit (paragraph by paragraph) under oath, and it was incorporated into, and made an exhibit to, his deposition.<sup>6</sup> (*Id.* at 1457-67). The Murray affidavit contains a detailed factual chronology which directly addresses all of the allegations against Simmons in the Complaint. (*Id.* at 5865-6058). Moreover, the Murray affidavit specifically identifies and denies each and every allegation of collaborative or joint action and flatly states that each such assertion by Fischer Bros. was false and was known to be false when made. (*Id.*).

Simmons took the depositions of the two Fischer Bros.' principals most likely to be knowledgeable regarding the substantive allegations of the Complaint. (J.A. at 3874-5175). When confronted with specific allegations of joint or collaborative action, William R. Fischer, senior vice-president of Fischer Bros., engaged in a repeated pattern of initially denying that such an allegation was ever made,

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<sup>6</sup> Prior to the reaffirmation of his affidavit at his deposition, Mr. Murray attended or read all of the depositions of Fischer Bros.' and Northwest's principals taken prior to his own, examined all the exhibits to those depositions, and read a "very substantial number" of documents produced in discovery by both Fischer Bros. and Northwest. (J.A. at 1458). During his deposition, Mr. Murray testified that at all relevant times regarding the matters alleged in the Complaint, Simmons acted independently in pursuit of its contractual rights, and that it never acted in conjunction or collaboration with Northwest or anyone else. (J.A. at 1466-67).

reversing his denial after being physically shown the paragraph containing the allegation, and finally admitting that he had no facts or evidence to support any of the allegations in the Complaint. (See, e.g., *Id.* at 4392-4405, 4411-22, 4424-30). Similarly, Montford Fischer, president and chief executive officer of Fischer Bros., testified that all allegations of joint or collaborative action in the Complaint were based upon speculation and assumption rather than fact. (See, e.g., *Id.* at 3985-87, 4062-63, 4074-75, 4097, 4110-16, 4173-74, 4178).

After the completion of discovery, Simmons filed its motion for summary judgment. (J.A. at 167-69; see also *Id.* at 5231-73). Simmons specifically attacked the 16 "items of evidence" Fischer Bros. cited as establishing concerted action. (*Id.* at 6406-10). Simmons also argued that Fischer Bros. had failed to prove antitrust injury or an unreasonable restraint of trade under Section 1, and an overt, conspiratorial act or specific intent to monopolize under Section 2. (*Id.* at 5267). As to Fischer Bros.' state law claims, Simmons argued that Fischer Bros. had failed to prove that any such violation occurred, and that Simmons' alleged actions were privileged under the Restatement (Second) of Torts §§ 768, 773 (1979). (*Id.* at 5270-71).

Chief Judge Alsop granted Simmons' and Northwest's motions for summary judgment and dismissed the entire action.<sup>7</sup> (App. at B-23). While expressly acknowledging that both Simmons and Northwest had raised alternative

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<sup>7</sup> At the hearing on the motions for summary judgment, Fischer Bros.' Section 2 claims of monopolization and attempt to monopolize against Simmons were abandoned. During that hearing, counsel for Fischer Bros. stated, on the record, that the only charge against Simmons under Section 2 was conspiracy to monopolize. (Tr. at 39, 81-82).

grounds, such as lack of antitrust injury, the trial court declined to address those other grounds. (*Id.* at B-10). Instead, the district court ruled that Fischer Bros. had failed to "establish a reasonable inference of conspiracy in light of the competing inference of independent action." (*Id.* at B-12; *see also Id.* at A-7). Moreover, the district court found that the 16 "items of evidence" presented by Fischer Bros. were "consistent with a unilateral decision by NW," taken out of context, "not sufficiently specific," contradictory, "conclusory allegations," provided no support, "inconsistent," misrepresentations and "unreasonable." (*Id.* at B-12 - B-15). Repeatedly giving Fischer Bros. more than "the benefit of all reasonable inferences that can be drawn from the underlying facts," the trial court relied upon this Court's opinions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and concluded:

In sum, plaintiffs have failed to provide evidence that tends to exclude the possibility that NW acted independently when terminating FBA. Consequently, plaintiffs' inference of conspiracy is unreasonable in light of the competing inference of independent action. Moreover, plaintiffs have not provided sufficient direct and circumstantial evidence that reasonably tends to prove that NW and Simmons had a conscious commitment to a common scheme to terminate FBA.

(*Pet.* at B-17).

As to Fischer Bros.' state law claims against Simmons, the district court found that Fischer Bros. "simply failed to create a factual issue regarding the existence of an agreement to terminate FBA." (*Id.* at B-18). The trial court also held that "Simmons can rely on Restatement (Second) of Torts § 768(1) (1979)." (*Id.*).

Fischer Bros. then appealed to the Eighth Circuit Court of Appeals.<sup>8</sup> The Eighth Circuit found it unnecessary to reach the merits of Fischer Bros.' claims against Simmons and Northwest. (App. at A-8 n.5). Instead, the Eighth Circuit held that Fischer Bros. had failed to meet its burden on a threshold issue: specifically, whether Fischer Bros. had suffered antitrust injury. (*Id.* at A-10 - A-13). The Eighth Circuit found that Fischer Bros.' injury was the result of its termination, that its termination was not caused by anticompetitive conduct or an anticompetitive effect of such conduct, and that Fischer Bros. had not suffered antitrust injury. (*Id.* at A-13).

## REASONS WHY THE PETITION SHOULD BE DENIED

### Summary of Reasons

Fischer Bros.' Petition should be denied for all the reasons stated by the Eighth Circuit majority, for the reasons stated by the district court but not relied upon by the majority, and for the reasons stated by Respondents that were never addressed by either the Eighth Circuit or the district court. Specifically, the Eighth Circuit was correct in

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<sup>8</sup> The only claims against Simmons properly before the Eighth Circuit were the claims of conspiracy under Sections 1 and 2. Fischer Bros. did not assign as error, discuss or brief the district court's ruling on the state law claims against Simmons in its appeal brief, its reply brief or in its Petition for Rehearing and Suggestion for Rehearing En Banc. Fischer Bros. consequently abandoned those state law claims, just as it had abandoned its Section 2 claims for monopolization and attempt to monopolize against Simmons. Even if Fischer Bros.' state law claims were not abandoned before, they certainly have been abandoned now. (Pet. at 9 n.4, 10 n.5).

finding that Fischer Bros. had not suffered antitrust injury and therefore lacked standing to bring this action. Moreover, the district court was correct in finding that Fischer Bros. did not present sufficient evidence of concerted action to survive a motion for summary judgment.

### **I. Certiorari Should Be Denied Because The Eighth Circuit Correctly Held That Fischer Bros. Did Not Suffer Antitrust Injury**

Fischer Bros. would have this Court believe that the issue of antitrust injury was "neither raised nor considered by the district court." (Pet. at 2, 11; *see also* App. at A-22 (Larson, J., concurring in part, dissenting in part)). Clearly, however, the district court was well aware that the issue had been raised by Respondents. (App. at B-10). In fact, the district court specifically discussed the antitrust injury question and noted that "the alleged injury was caused by the termination, and if such termination was the result of a unilateral decision by Northwest, then there is no concerted activity for which FBA has an injury." (*Id.* at B-16 n.13).

Fischer Bros. also urges this Court to grant certiorari in this matter because of a conflict among the circuits regarding antitrust injury.<sup>9</sup> (Pet. at 15-16). That conflict is at most limited to the question of whether to apply an extra-rigorous or less rigorous standing analysis and has no bearing on this case. The Eighth Circuit clearly recognized that some courts have applied a higher standard, but found it unnecessary to apply that higher standard in this case. (App. at A-12).

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<sup>9</sup> It should be noted that in the two cases in which Fischer Bros. claims "[t]he conflict . . . appears most vividly" (Pet. at 15), this Court has denied certiorari. *See R. C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102 (2d Cir.), *cert. denied*, 110 S.Ct. 64 (1989); *Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95 (5th Cir.), *cert. denied*, 486 U.S. 1023 (1988).

More specifically, the Eighth Circuit found that Fischer Bros. failed to meet even the lesser standard, and that if it were to apply the higher standard, Fischer Bros. would have "further obstacles to pass before it could establish that it is entitled to damages under section 4."<sup>10</sup> (*Id.*).

Fischer Bros. then argues that the Eighth Circuit misconstrued and disregarded this Court's decisions in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).<sup>11</sup> Fischer Bros. asserts that it raised a question of fact regarding the existence of a conspiracy between Northwest and Simmons to terminate Fischer Bros., that it was terminated pursuant to that conspiracy, and that consequently, under those cases, it necessarily suffered antitrust injury. In effect, Fischer Bros.' argument is that if it made out a substantive violation of the antitrust laws, then, *ipso facto*, it suffered antitrust injury. In so arguing, Fischer Bros. totally misconstrues the law of antitrust injury.

*Brunswick* and *Cargill* stand for the proposition that a private antitrust plaintiff seeking redress under either Sections 4 or 16 of the Clayton Act must prove antitrust injury. *Cargill*, 479 U.S. at 113; *Brunswick*, 429 U.S. at 489. Proof of a substantive violation of the antitrust laws does not, by

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<sup>10</sup> These "further obstacles" were not addressed by the Eighth Circuit and would remain to be addressed if this Court were to remand this action to the Eighth Circuit.

<sup>11</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), has no application to the claims against Simmons. (Pet. at 23). *Aspen* involved claims of monopolization under Section 2 regarding single-firm conduct. Fischer Bros.' claims against Simmons do not involve single-firm conduct and do not include claims of monopolization.

itself, grant a plaintiff the right to recover damages. *Brunswick*, 429 U.S. at 486; *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir. 1989). See also Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv.L.Rev. 1127, 1128-1130 (1976). The antitrust laws were not intended to provide a remedy for all injuries that conceivably might be traced to a substantive antitrust violation. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77 (1982); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 263 n.14 (1972). "[T]o recover damages [a plaintiff] must prove more than that [the defendant] violated [the antitrust laws], since such proof establishes only that injury may result." *Brunswick*, 429 U.S. at 486. Rather, the plaintiff must show "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick*, 429 U.S. at 489; see also *Cargill*, 479 U.S. at 109. The antitrust injury requirement is derived from Section 4 of the Clayton Act and not from the statutory sections governing substantive violations of the antitrust laws. *Cargill*, 479 U.S. at 109; *Brunswick*, 429 U.S. at 485-86. Section 4 of the Clayton Act requires that a court focus on "the type of injury claimed by a particular plaintiff . . . ." *Indiana Grocery*, 864 F.2d at 1419 (emphasis in original). That inquiry requires examination of the facts of the particular case. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 536-37 (1983).

Whatever injury Fischer Bros. may have suffered, it was not antitrust injury. After the merger, both Fischer Bros. and Simmons wanted to be selected as Northwest's exclusive regional carrier at Detroit. Fischer Bros. claimed that it was injured when it was terminated as Northwest's exclusive regional carrier. (App. at A-13). Fischer Bros. and Simmons resemble competing bidders, with Fischer Bros. as the disgruntled loser. See, e.g., *Midwest Communications*,

*Inc. v. Minnesota Twins, Inc.*, 779 F.2d 448, 451-52 (8th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986). Fischer Bros. would have suffered an identical injury regardless of whether it was terminated unilaterally or pursuant to a conspiracy between Northwest and Simmons. Any injury flows from the termination, and not from the alleged conspiracy. To paraphrase *Brunswick*, while Fischer Bros.' loss occurred "by reason of" this termination, it did not occur "by reason of" that which allegedly made the termination unlawful. *Brunswick*, 429 U.S. at 488.

The contrary conclusion that Judge Larson reached was based on Fischer Bros.' version of the facts, which he merely adopted in misapplying the antitrust injury requirement. In "[a]ssuming Fischer Bros. can prove its allegations of a conspiracy . . .," (App. at A-22, Larson, J., concurring in part, dissenting in part), Judge Larson treated Respondents' motions like motions to dismiss and not motions for summary judgment. Judge Larson's rote adoption of Fischer Bros.' version of the facts, misstatements and all, raises a substantial question regarding the correctness of his opinion.

The issue of antitrust injury was properly before both the district court and the Eighth Circuit Court of Appeals, and the "conflict among the circuits" posited by Fischer Bros. is of no consequence in this action. The Eighth Circuit did not misapply the decisions of this Court regarding antitrust injury. It properly focused on the type of injury claimed by Fischer Bros. and correctly found that Fischer Bros. did not suffer antitrust injury.

## II. Certiorari Should Be Denied Because The District Court Correctly Found That Fischer Bros. Failed To Raise A Question Of Fact Regarding The Existence Of A Conspiracy Between Simmons And Northwest

Fischer Bros. attempts to attack, *sub silentio*, the district court's finding that Fischer Bros. wholly failed to raise a question of fact regarding the existence of a conspiracy between Simmons and Northwest. Fischer Bros.' attempt to reargue the facts is both improper and unavailing, since the district court's finding is correct.

Chief Judge Alsop carefully examined the evidence presented in support of Respondents' motions for summary judgment.<sup>12</sup> Correctly analyzing and applying *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the district court drew all reasonable inferences in favor of Fischer Bros., the non-moving party. Indeed, despite the admonition of *Trnka v. Elanco Products Co.*, 709 F.2d 1223, 1225 (8th Cir. 1983), the district court went beyond reasonable inferences in accepting Fischer Bros.' assumptions and contentions.<sup>13</sup> Nevertheless, the district court, after carefully comparing

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<sup>12</sup> The depth of the district court's review of the evidence is illustrated by its review of a Northwest memorandum to determine the veracity of Fischer Bros.' baseless allegations concerning a "secret meeting". (App. at B-11 - B-12).

<sup>13</sup> For example, the district court accepted as true Fischer Bros.' contention that Simmons contacted Rasmusson on September 23 or 24. (App. at B-15). The record is devoid of any evidence to support that contention and, indeed, the evidence is to the contrary. (J.A. at 304-07, 508-09, 564-67, 620, 785-86, 845, 911-13, 1005-06, 1009-10, 1195, 1432-37, 1534-36, 1537-38, 1646-47, 1649-51, 1692, 1819-22, 2134-36, 4172-74, 4485-88, Houk Tr. at 81, Wheeler Tr. at 18).

Fischer Bros.' "items of evidence" with the cited record, characterized the majority of those items as "consistent with a unilateral decision by NW," taken out of context, "not sufficiently specific," contradictory, "conclusory allegations," providing no support, "inconsistent," misrepresentative and "unreasonable." (App. at B-12 - B-15). The district court simply could not find sufficient evidence of a conspiracy between Simmons and Northwest.

Judge Larson, on the other hand, did not examine the record. He simply adopted, *in toto*, Fischer Bros.' version of the facts. (App. at A-21 ("I believe these facts constitute sufficient evidence . . ."), A-22 ("Assuming Fischer Bros. can prove its allegations of conspiracy . . .") (Larson, J., concurring in part, dissenting in part)).<sup>14</sup> In particular, Judge Larson failed to consider the evidence presented by Simmons and Northwest which established that they acted independently and which negated any alleged inference of concerted action. Moreover, by adopting Fischer Bros.' version of the facts, Judge Larson also adopted the assumptions, speculation and numerous record distortions made by Fischer Bros.<sup>15</sup>

Moreover, adopting Fischer Bros.' version of the facts is not justified by asserting that Fischer Bros. is entitled to all reasonable inferences from the facts. The antitrust laws limit the range of inferences that permissibly may be drawn in the non-movant's favor. *See, e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). To survive a motion for summary judgment, a plaintiff asserting

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<sup>14</sup> Petitioners' Statement of the Case is virtually devoid of actual record citations. Instead, Petitioners cleverly rely almost entirely upon Judge Larson's purported findings. (Pet. at 2-11).

<sup>15</sup> Many of those same record distortions are repeated in Fischer Bros.' petition to this Court. (See note 3, *supra*).

concerted action must present evidence that "tends to exclude the possibility that the alleged conspirators were acting independently." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). Fischer Bros. has totally failed to meet the "severe burden" of showing concerted action between Simmons and Northwest. See *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 523 (8th Cir. 1987).

The facts of record establish that, after its acquisition of Republic, Northwest was faced with two exclusive contracts to perform the same service. When efforts to resolve this conflict failed, Northwest was left with no alternative but to eliminate duplicative services by terminating one contract. Simmons' contract could not be terminated for any reason until October, 1988, while Fischer Bros.' contract could be terminated by either party on six months' notice, with or without cause. The record is clear that if the contract provisions were reversed, Northwest would have terminated Simmons and not Fischer Bros. (J.A. at 447-49). Given the disparity in contract terms, terminating Fischer Bros., instead of Simmons, was simply an exercise in good business judgment. See, e.g., *Pumps & Power Co. v. Southern States Industries, Inc.*, 787 F.2d 1252 (8th Cir. 1986); *Impro Products, Inc. v. Herrick*, 715 F.2d 1267 (8th Cir. 1983), cert. denied, 465 U.S. 1026 (1984). A defendant's legitimate or non-conspiratorial business grounds for the challenged action negate an inference of concerted action. See, e.g., *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575 (11th Cir. 1988); *Gibson v. Greater Park City Co.*, 818 F.2d 722 (10th Cir. 1987); *Continental Maritime of San Francisco, Inc. v. Pacific Coast Metal Trades District Council*, 817 F.2d 1391 (9th Cir. 1987).

Moreover, a conspiracy between Simmons and Northwest to terminate Fischer Bros. makes no sense. The con-

tract terms overwhelmingly favored retaining Simmons and terminating Fischer Bros. Northwest always had the power to terminate Fischer Bros., and that power was not enhanced by either Northwest's acquisition of Republic or any alleged conspiracy with Simmons. Northwest simply exercised its option to eliminate duplicative services and the resultant inefficiency and waste.

### CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

March 8, 1990

Respectfully submitted,

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